AADITHYA CHAIN SDN BHD & ANOR v. STANDARD CHARTERED SAADIQ BHD

HIGH COURT MALAYA, KUALA LUMPUR
KHADIJAH IDRIS JC
[CIVIL APPEAL NO: WA-12AM-2-03-2018]
4 OCTOBER 2018

CIVIL PROCEDURE: *Judgments and orders – Setting aside – Application to set aside judgment in default – Whether application made within time period stipulated under O. 42 r. 13 of Rules of Court 2012 – Whether there was inordinate delay – Whether there were merits in defence – Whether circumstances arose justifying court to set aside judgment in default*

CIVIL PROCEDURE: *Judgments and orders – Setting aside – Application to set aside judgment in default – Claim for outstanding sum under Islamic banking facility – Whether facility under Shariah Bai-Al-Inah principles valid – Whether facility granted complied with Shariah principles – Whether there were merits in defence – Whether circumstances arose justifying court to set aside judgment in default*

The plaintiff agreed to grant and the first defendant duly accepted an Islamic banking facility pursuant to *Bai' Al-Inah* Shariah Principles ('the facility') in the sum of RM432,169.64. In consideration of the plaintiff's agreement to grant the first defendant the facility, the second defendant agreed to jointly and severally guarantee repayment of all outstanding amount under the facility upon demand. For that purpose, the second defendant executed a guarantee agreement ('the guarantee agreement') in favour of the plaintiff. The defendants defaulted in their repayment obligation under the facility despite various reminders sent by the plaintiff. By way of notice of demand and termination ('letter of demand'), the facility was terminated and the plaintiff claimed against the defendants the total outstanding sum of RM287,689.21. The defendants failed, neglected and/or refused to comply with the letter of demand. Hence, the plaintiff initiated legal action against the defendants at the Sessions Court wherein a writ of summons and statement of claim ('writ of summons') was issued. The defendants failed to enter appearance and consequentially a judgment in default of appearance was entered against the defendants, which was served on the defendants *via* registered post. Pursuant to the judgment in default, a receiving order and adjudication order was made against the first defendant. The defendants filed encl.6, a notice of application, to set aside the judgment in default ('setting aside application') four years after service of the judgment in default was entered on the defendants. The defendants submitted that (i) the delay in filing the setting aside application was because the first defendant was not aware of the writ of summons and the judgment in default; (ii) the first defendant was not advised by his former solicitor that a judgment in default was entered against him and as such he should not be prejudiced by his

former solicitor's mistake; and (iii) the facility under *Shariah Bai-Al-Inah* principles was invalid as it did not contain the asset purchase agreement and asset sale agreement which formed the basis of the said facility. At the outset, the plaintiff raised a preliminary point – that the defendants' setting aside application was not made within the time period stipulated under O. 42 r. 13 of the Rules of Court 2012 ('ROC'). The plaintiff also contended that the judgment in default was regularly obtained and that they had duly complied with the requirements under the concept of *Bai Al-Inah* Shariah principles. The issue that arose was whether there were circumstances which justified this court to set aside the judgment in default.

Held (allowing defendants' appeal):

(1) The defendants' setting aside application was filed four years after the judgment in default was obtained and served on the defendants. Without doubt, it was an absolute non-compliance with O. 42 r. 13 of the ROC which required an application to set aside judgment be filed within 30 days after the same was served on the applicant. The delay was inordinate and the reasons given by the first defendant that he was not aware of and was not advised by his solicitor of the judgment in default was not acceptable. (paras 22 & 25)

(2) Having considered the Shariah requirement, it was doubtful that the contract of sale and contract of purchase had fulfilled the requirement of a valid and legally bound asset purchase agreement and asset sale agreement in the context of the *Bai Al-Inah* contract. Based on the facts gathered from the affidavits, the offer ought to be made by the first defendant to whom the financing was granted. However, looking at the application form, one could not say for sure the offer was made by the first defendant. The first defendant was named as the customer as stated at Item 3 of the application form whereas the second defendant was named as the applicant at what seemed to be Item 7. Assuming the offer was made by the first defendant, there was no indication that the plaintiff accepted the offer. Further, the letter of offer purportedly to be the contract of purchase was only executed by the first defendant. There was nothing to show that the plaintiff had executed the said letter to signify its acceptance. (para 36)

(3) The asset purchase agreement and asset sale agreement must be separately and independently executed by both the plaintiff and the defendant to expressly signify their intention to sell and purchase the asset. Considering the affidavit evidence of the defendants, there were merits in the defendants' defence that the asset purchase agreement and the asset sale agreement was not executed. As such, whether the facility granted had complied with the Shariah principles as stipulated in the Shariah Advisory Council Guidelines issued by Bank Negara Malaysia was an arguable issue. (paras 37-39)

(4) There were compelling reasons for this court to intervene and set aside the judgment in default. The defendants ought to be allowed to file their defence to present their position in relation to the validity of the facility and for it to be ventilated by the parties and adjudged by the court. (para 41)

Case(s) referred to:

China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal [1996] 3 CLJ 163 FC ***(refd)***

Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 FC ***(refd)***

Perembun (M) Sdn Bhd v. Conlay Construction Sdn Bhd [2012] 1 LNS 1416 CA ***(refd)***

Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***

Tetuan Tan Teng Siah Realty Sdn Bhd v. Island Oil Palm Plantations Sdn Bhd & Anor [1997] 4 CLJ 634 HC ***(refd)***

Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 CLJ 241 FC ***(refd)***

Legislation referred to:

Islamic Financial Services Act 2013, s. 29

Rules of Court 2012, O. 10 r. 3(1)(b), O. 13 r. 8, O. 42 r. 13, O. 62 rr. 3, 4(1)(b)

For the appellants - Mugunthan Vadiveloo; M/s Mugu & Sufyan & Co

For the respondent - Fadil Azuwan Zainon; M/s Arifin & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Khadijah Idris JC:

Introduction

[1] On 26 June 2018, this court allowed the appeal filed by the defendant against the order of the Sessions Court on 20 February 2018 (order dated 20 February 2018) which dismissed the defendants' notice of application (encl. 6) pursuant to O. 42 r. 13 read together with O. 62 r. 3 of the Rules of Court 2012 (ROC 2012) for, *inter alia*, the following orders:

(a) Judgment in default dated 29 October 2013 be set aside;

(b) Defendants given extension of time to make such application; and

(c) Defendants be allowed to file a defence within 14 days from the date of order setting aside the judgment in default.

[2] Enclosure 6 (setting aside application) sought, *inter alia*, for the following orders:

(a) Judgment in default dated 29 October 2013 be set aside;

(b) Defendants be given extension of time to make such application; and

(c) Defendants be allowed to file a defence within 14 days from the date of order setting aside the judgment in default.

[3] Aggrieved by the said decision, the defendants appealed. Below are my reasons for allowing the defendants' appeal.

Parties

[4] Plaintiff, Standard Chartered Saadiq Berhad, is a licensed Islamic financial institution.

[5] The defendants are as follows:

(a) the first defendant, Aadithya Chain Sdn Bhd (first defendant), is a company incorporated in Malaysia; and

(b) the second defendant, Sugumaran K Chellaiah (second defendant), is an individual who is also a director of the first defendant.

The parties will hereinafter be referred to as they were in the Sessions Court.

Background Facts

[6] At the first defendant's request and by way of a letter of offer dated 29 June 2012 (letter of offer), the plaintiff agreed to grant and the first defendant had duly accepted an Islamic banking facility pursuant to *Bai' Al-Inah* Shariah principles (the facility) in the sum of RM432,169.64 under Account No. 60030038.

[7] In consideration of the plaintiff's agreement to grant to the first defendant the facility, the second defendant agreed to jointly and severally guarantee repayment of all outstanding amount under the facility upon demand. For that purpose, the second defendant executed a guarantee agreement dated 29 June 2012 (the guarantee agreement) in favour of the plaintiff.

[8] The defendants defaulted in their repayment obligation under the facility despite various reminders sent by the plaintiff. By way of notice of demand and termination dated 12 September 2013 (letter of demand), the facility was terminated and the plaintiff claimed against the defendants the total outstanding sum of RM287,689.21 (outstanding sum) as at 12 September 2013 under the facility.

[9] The defendants failed, neglected and/or refused to comply with the letter of demand. Hence, the plaintiff initiated legal action against the defendants at the Sessions Court of Kuala Lumpur *vide* Guaman No. A52M-2917-10-2013 wherein a writ of summons and statement of claim dated 1 January 2013 (the writ of summons) was issued claiming for the total outstanding sum as at 12 September 2013.

[10] The defendants failed to enter appearance and consequentially judgment in default of appearance was entered against the defendants (judgment in default) on 29 October 2013. The judgment in default was served on the defendants *via* registered post through the plaintiff's solicitor letter dated 1 November 2013 posted on even date.

[11] Pursuant to the judgment in default, a receiving order and adjudication order was made against the first defendant on 27 January 2016.

[12] The defendants filed encl. 6, a notice of application, to set aside the judgment in default (setting aside application) on 24 October 2017 which is about four years after service of the judgment in default on the defendants.

Defendants' Submission

[13] The defendant submission supporting their appeal against the order dated 20 February 2018 are as follows:

(a) the delay in filing the setting aside application was because the defendant was not aware of the writ of summons and the judgment in default. The first defendant avers his address is at 33, Limau Purut, Bangsar Baru and not the two addresses stated in the writ of summons.

(b) the first defendant also avers that he was not advised by his former solicitor that a judgment in default was entered against him and as such he should not be prejudiced by his former solicitor's mistake.

(c) the facility under *Shariah Bai' Al-Inah* principles is invalid as it does not contain the asset purchase agreement and asset sale agreement which forms the basis of the said facility as stipulated in the Shariah Resolution in Islamic Finance Second Volume (2nd edn) issued by the Shariah Advisory Council of Bank Negara Malaysia. The defendants rely on a letter dated 4 March 2016 issued by the plaintiff's solicitor to the defendants' solicitor which the defendants claim as evidence of the absence of the asset purchase agreement and asset sale agreement.

Plaintiff's Submission

[14] At the outset, the plaintiff raised a preliminary point - that the defendants' setting aside application was not made within the time period stipulated under O. 42 r. 13 of the ROC 2012. Instead, it was filed about four years after the judgment in default was served on the defendants and no valid reason was given by the defendants for the delay. As such, the defendants' setting aside application ought to be dismissed *in limine*.

[15] The plaintiff contends the judgment in default was regularly obtained:

(a) the service of the writ of summons was duly effected on the first defendant pursuant to O. 62 r. 4(1)(b) of the ROC 2012 whereas the same was effected on the second defendant based on the terms of the contract pursuant to O. 10 r. 3(1)(b) of the ROC 2012.

(b) the defendants failed to inform the plaintiff of the change of address in accordance with cl. 40(a) of the facility and cl. 30.1 of personal guarantee agreement. Hence, the service was regularly effected to the last known address of the defendants which was obtained from the letter

of offer, the personal guarantee agreement and the company search from the Companies Commission of Malaysia (CCM) dated 23 September 2013.

[16] The plaintiff contend they had duly complied with requirements under the concept of *Bai' Al-Inah* Shariah principles. This is evident from the following transactions:

(a) the application form dated 18 June 2012 which was signed by the second defendant shows the first defendant made the offer to buy from the plaintiff the asset referred to in the facility namely the "Sijil Pelaburan Mudharabah" (the asset) at the sale price by deferment which is RM432,169.64.

(b) the letter of offer shows that the first defendant resells (immediately) to the plaintiff and the plaintiff buys back the asset at the agreed sale price of RM350,000.

The Law

[17] With regards to the duty and function of an appellate court, cases of high authorities have held that as a general principle, an appellate court will be slow to interfere with the findings of facts and judicial appreciation of the facts of the trial judge unless it appears that those findings are clearly wrong (*China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appea*l [1996] 3 CLJ 163, *Perembun (M) Sdn Bhd v. Conlay Construction Sdn Bhd* [2012] 1 LNS 1416, *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545; [1995] 3 MLJ 395).

[18] As regards to the application for setting aside judgment in default, O. 42 r. 13 of the ROC 2012 requires such application to be filed in court and served it on the party who has obtained the judgment within 30 days after the receipt of the said judgment. Pursuant to O. 13 r. 8 of the ROC 2012 the court has the discretionary power to set aside or vary any judgment on such terms as it thinks just.

[19] In the Federal Court case of *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305 Mohd Azmi FCJ held as follows:

> The principle of setting aside a default judgment under O. 13 r. 8 has been well established and needs no detailed repetition. What is important to observe is that a default judgment is not a judgment on the merits. Accordingly, when such judgment is obtained irregularly, such irregularity would be sufficient ground by itself for setting it aside. But where the default judgment has been obtained regularly, in order to succeed the defendant must file an affidavit of merits, i.e. the defendant must disclose by affidavit evidence that *prima facie* he has a defence of merits. Put in another way, the affidavit must disclose that he has an arguable or triable issue on the merits. (see *Evans v. Bartlam* [1937] AC 478).

[20] As to what is considered as "defence of merits" the High Court in the case of *Tetuan Tan Teng Siah Realty Sdn Bhd v. Island Oil Palm Plantations Sdn Bhd & Anor* [1997] 4 CLJ 634 said:

> A defence has merits if there is reasonable prospect of success on the grounds stated and evidence placed before the court.

Findings Of The Court

Preliminary Issue

[21] At the hearing of the appeal, learned counsel for the defendants conceded that the judgment in default was regularly obtained. As such the next issue to be determined is whether the defendants' defence has merits. In their affidavit in support of the setting aside application, the defendants attached a copy of their statement of defence. Before I deal with the issue of the defendants' meritorious defence, there is another issue raised by the plaintiff which this court need to address – the delay by the defendants in filing the setting aside application.

[22] It is not disputed that the defendants' setting aside application was filed four years after the judgment in default was obtained and served on the defendants. Without doubt, it is an absolute non-compliance with O. 42 r. 13 of the ROC 2012 which requires application to set aside judgment be filed within 30 days after the same was served on the applicant.

[23] In respect of non-compliance, the defendants referred to a Federal Court case *Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 CLJ 241; [1996] 1 MLJ 30; where among the issues dealt by the court was delay of about three years on the part of the defendant in filing his application to set aside the judgment in default of appearance. The court held:

> But the further hurdle which confronted the appellant and which he had to surmount was that there had been a spectacular delay of some three years before he bestirred himself into applying to the High Court to set aside the default judgment though admittedly, he had not taken any fresh step after becoming aware of the irregularity.
>
> Nevertheless, it is clear law that the court still retains a discretion to set aside an irregular judgment despite long delay, provided it is satisfied that:
>
> (a) no one has suffered prejudice by reason of the defendant's delay;
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> (b) alternatively, where such prejudice has been sustained, it can be met by an appropriate order as to costs; or
>
> (c) to let the judgment to stand would constitute oppression. (See *Atwood v. Chichester* (1878) 3 QBD 722; *Harley v. Samson* (1914) 30 TLR 450.)
>
> We would add that under its inherent jurisdiction to prevent an abuse of its proceedings, the court has power to set aside a judgment in default, despite the defendant's application being out of time, if the particular circumstances of the case require the intervention of the court. (See *Beale v. McGregor* (1886) 2 TLR 311.)

[24] The court held the default judgment was a nullity as it was uncertain and unclear on the face of it on the ground, *inter alia*, that the contractual interest payable was not sufficiently specified. Due to the uncertainty and ambiguity, the defendant would not be able to ascertain for himself the amount which he is legally liable to pay under the default judgment, if he is to avoid proceedings for enforcement of the default judgment. Under the circumstances, despite the inordinate delay on the part of the defendant, the Federal Court set aside the judgment in default and directed the defendant be at liberty to enter defence.

[25] In the instant case, in so far as the delay is concerned, I agree with the plaintiff that the delay is inordinate and that the reasons given (first defendant claim he is not aware of and was not advised by his solicitor of the judgment in default) by the defendants for the delay is just not acceptable. However, based on the decision of the Federal court in the case of *Tuan Hj Ahmed Abdul Rahman*, I am bound to consider whether there are circumstances which justify this court to set aside the judgment in default. This essentially requires this court to determine whether the affidavit evidence adduced shows there is merit in the defendants' defence.

[26] The defendants had attached their proposed defence to the affidavit in support of the setting aside application. The deraf penyataan pembelaan (draft defence) is exhibited as exh. SC-4 to encl. 6. In the said draft defence, the defendants pleaded that the *Bai' Al-Inah* Facility granted by the plaintiff to the defendants is because the asset sale agreement (ASA) and asset purchase agreement (APA) was not executed. The absence of the ASA and APA is in contravention of the Shariah Advisory Council Guidelines issued by Bank Negara Malaysia under s. 29 of the Islamic Financial Services Act 2013.

[27] In support of the said defence, the defendants produced a letter dated 4 March 2016 from the plaintiff's solicitor (plaintiff's letter). The said letter was a reply to the request made by the defendants through their solicitor for a copy of the ASA and APA. The plaintiff's letter read as follows:

> 2. We are unable to provide you with Asset Purchase Agreement and Asset Sale Agreement as your client did not execute such documents when applying facility of *Bai' Al-Inah* with our client under Account No: 60030038.
>
> 3. The Asset Purchase Agreement and Asset Sale Agreement are normally executed in housing loan cases under Al-Bai Bithaman Ajil (BBA) and involve properties charged to the Bank(s).
>
> 4. In your client's case, the facility granted to your client's Company, Aadithya Chain Sdn Bhd, was a business facility and there was no property(ies) charged to our client in consideration of the facility given to the said Company.

[28] With regard to the validity issue raised by the defendants, the plaintiff took the position that even though there was no APA and ASA executed, the facility granted is valid. To substantiate such position, the plaintiff refers to the application form dated 18 June 2012 (exh. SCSB1 at pp. 49 to 55 rekod rayuan jilid 1) and the letter of offer dated 29 June 2012 (exh. SCSB1 at pp. 56 to 67 rekod rayuan jilid 1) which the plaintiff claims as evidence that the requirement for asset sale and asset purchase was duly complied.

[29] The statement in the application form which is said as evidence of the asset sale requirement is found at item 5 para. 17 (not para. 7 as submitted by the plaintiff in its written submission dated 18 April 2018) which read as follows:

> I/We make an offer to purchase from the Bank a Mudharabah Investment Certificate which represent 1/5,000 beneficial owner of Islamic Negotiable Instrument of Deposit (INID) with nominal value of RM5,000,000 held by the Bank ("Asset") at a price to be stipulate by the Bank which is equivalent to the facility amount approved plus a margin profit ("Offer by Me/Us")

[30] By the above clause, the plaintiff contends that the first defendant had made the offer to buy from the plaintiff the asset, namely, the Sijil Pelaburan Mudharabah (asset) at the sale price by deferment which is RM432,169.64. In other words, the plaintiff submits the above provision in the application form evident the contract of sale.

[31] With regards to the APA requirement, the plaintiff refers to a statement in the letter of offer dated 29 June 2012 which says the following:

> Pursuant to your offer to purchase as per the application form, we hereby accept your offer to purchase the Mudharabah Investment Certificate ("Certificate") at a price (made up of facility amount and profit margin) ("Sale Price") on a deferred payment term.

[32] It is the plaintiff's position that the above statement is evidence of the contract of purchase whereby the first defendant had resold the asset immediately to the plaintiff who bought back the asset at the agreed sale price of RM350,000.

[33] The Shariah Resolutions in Islamic Finance by Bank Negara Malaysia, 2nd edn, states, at p. 109:

> *Bai' 'Inah* refers to a contract which involves sale and buy back transactions of an asset of a seller. In those transactions, the seller sells an asset to the buyer on cash basis and then buys back the asset at a deferred price, which is higher than the cash price. It may also be conducted where the seller sells the asset to the buyer at a deferred price and subsequently buys back the asset on cash basis at a lower price than the deferred sale price ...

[34] The Shariah Advisory Council in its 16th meeting on 11 November 2009 and the 82nd meeting on 17 February 2009 has resolved that for a *Bai' Al-Inah* contract to be valid, the following conditions must be fulfilled:

(i) Consisting of two clear and separate contracts, namely, a purchase contract and a sale contract;

(ii) No stipulated condition in the contract to repurchase the asset;

(iii) Both contracts are concluded at different times;

(iv) The sequence of each contract is correct, whereby the first sale contract shall be completely executed before the conclusion of the second sale contract; and

(v) Transfer of ownership of the asset and a valid possession (*qabd*) of the asset in accordance with Shariah and current business practice ('*urftijari*').

[35] As the essence of *Bai' Al-Inah* transaction or contract is grounded upon the basic premise that involves the sale and buy-back transactions of an asset, then there must be two clear and separate contracts to reflect the sale and subsequently the buy-back of the asset of a seller. This would necessarily mean two legally bound, separate and independent contracts to be executed by the seller and the buyer. The first contract is for the sale of the asset (asset sale agreement/contract) and the second contract is for the purchase of the asset (purchase asset agreement/contract). This necessarily means for each of the agreements the element of a valid contract in accordance with Shariah must exist, including offer and acceptance.

[36] Having considered the Shariah requirement, I am of the view it is doubtful that the contract of sale and contract of purchase have fulfilled the requirement of a valid and legally bound asset purchase agreement and asset sale agreement in the context of *Bai' Al-Inah* contract. My reasons are as follows:

(a) item 5 para. 17 of the application form appears to be an offer made to purchase the asset (which is the Sijil Pelaburan Mudharabah). Based on the facts gathered from the affidavits, the offer ought to be made by the first defendant to whom the financing was granted. However, looking at the application form one cannot say for sure the offer was made by the first defendant. This is because the first defendant was named as the customer as stated at item 3 of the application form, whereas the second defendant was named as the applicant at what seems to be item 7. Assuming the offer was made by the first defendant, there is no indication that the plaintiff accepted the offer. Another pertinent point to note is that the sale price of the asset was not stated.

(b) The letter of offer purportedly to be the contract of purchase was only executed by the first defendant. There is nothing to show that the plaintiff had executed the said letter to signify its acceptance. A signature

which appears at the end of the letter of offer (see p. 58 rekod rayuan jilid 1) does not appear to be related to the plaintiff as it was signed by a person with the rubber stamp of another company "Price Solutions Sdn Bhd".

[37] Considering the affidavit evidence and the defendants' draft defence, I am of the considered opinion there is merit in the defendants' defence that the asset purchase agreement and the asset sale agreement was not executed. As such whether the facility granted had complied with Shariah principles as stipulated in the Shariah Advisory Council Guidelines issued by Bank Negara Malaysia is an arguable issue.

[38] Perhaps the best illustration of the significance of the asset purchase agreement and asset sale agreement in a *Bai' Al Inah* contract can be found in *Law and Practice of Islamic Banking and Finance* (3rd edn) by Nik Norzrul Thani, Mohamed Ridza Abdullah, Megat Hizaini Hassan, where the learned authors states:

> [7.025] In terms of sequence, the Shariah Advisory Council at Bank Negara Malaysia's ruling also reflected that the asset purchase agreement takes place prior to the execution of the asset sale agreement if both the asset purchase agreement and the asset sale agreement are executed on the same day. If there are security agreements to be executed, it would take place after the execution of the asset sale agreement.
>
> [7.026] In one of the transactions which involved the author as an adviser, a ceremony of contract execution was performed utilising the true principles of Shari'ah which was witnessed and confirmed by three muftis on the authenticity of the transaction according to Shari'ah. As an illustration, the following was the sequence of events:
>
> A. First contract ceremony (Asset purchase agreement)
>
> First: Execution of the asset purchase agreement by the customer. Second: Execution of the asset purchase agreement by the financier.
>
> Third: The customer declares the offer (Ijab) to the financier identifying the asset to be sold with a purchase price stipulated to be paid in cash.
>
> Fourth: The financier signifies its acceptance (Qabul) to the offer by agreeing to purchase the asset at the agreed purchase price to be paid in cash.
>
> Fifth: Confirmation from Shari'ah advisers on the transaction as witnesses.
>
> Sixth: The customer hands over the title of the asset to the financier.
>
> Seventh: The financier accepts the title of the asset from the customer and pays to the customer the purchase price of the asset.

A

Eight: The customer accepts the payment from the financier for the asset sold.

B. Second contract ceremony (Asset sale agreement)

First: Execution of the asset sale agreement by the financier. Second: Execution of the asset sale agreement by the customer.

B

Third: The financier declares the offer (Ijab) to the customer identifying the asset to be sold with a purchase price stipulated (which comprises the aggregate value of the purchase price in the asset purchase agreement and a profit) to be paid on a deferred basis as per the terms of the agreement.

C

Fourth: The customer signifies its acceptance (Qabul) to the offer by agreeing to purchase the asset at the agreed purchase price to be paid on a deferred basis.

Fifth: Confirmation from Shari'ah advisers on the transaction as witnesses.

D

Sixth: The financier hands over the title of the asset to the customer.

Seventh: The customer accepts the title of the asset from the financier. (emphasis added)

E **[39]** Thus, the asset purchase agreement and asset sale agreement must be separately and independently executed by both the plaintiff and the defendant to expressly signify their intention to sell and purchase the asset.

[40] Learned counsel for the defendants relies on the Latin maxim *ex turpi causa non oritur action* and submit that the judgment in default cannot be

F allowed to remain. I am of the view the maxim is not applicable at this stage as the validity or illegality of the facility granted has yet to be determined by the court. The paramount issue which requires the court determination at this juncture is whether the affidavit evidence has established defence of merits, which I found to be so.

G

[41] Premised on the above I am of the considered opinion that there are compelling reasons for this court to intervene and set aside the judgment in default. The defendants ought to be allowed to file their defence to present their position in relation to the validity of the facility and for it to be ventilated by the parties and adjudged by the court. I therefore allowed the

H defendants' appeal against the Sessions Court decision dismissing the setting aside application encl. 6 with costs.

I